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MAR 12 2010

CAPE MAY COUNTY
LAW DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAPE MAY COUNTY
DOCKET NO. CPM-L-804-09

BLAKESLEE TOWING RECOVERY, INC.,
d/b/a COURTHOUSE TOWING,

Plaintiff,

v.

SEA ISLE CITY and KINDLE, INC.,
d/b/a C & E TOWING,

Defendants.

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Civil Action
FINAL JUDGMENT

This matter was brought before the court upon the filing of a Complaint in Lieu of Prerogative Writs and Order to Show Cause filed on November 18, 2009, challenging the award of a competitive bidding contract for towing, storage and lock out services in Sea Isle City, New Jersey, said Complaint being filed by plaintiff, Blakeslee Towing Recovery, Inc., d/b/a Courthouse Towing, by its attorney, Charles W. Sandman, III, Esquire, and Answers to the Complaint having been filed by defendant, City of Sea Isle City, by its attorney, Paul J. Baldini, Esquire, and defendant, Kindle, Inc., d/b/a C & E Towing, by its attorney, Louis C. Dwyer, Jr., Esquire (Corino & Dwyer), and the court having held a hearing on February 9, 2010, and having thereafter issued a 32 -page written Decision dated March 12, 2010, and for the reasons set forth therein, for good cause shown;

IT IS on this 12TH day of March, 2010 ORDERED as follows:

1. The contract for towing, storage, and lock out services in the Sea Isle City awarded to Kindle, Inc. d/b/a C & E Towing is hereby invalidated and set aside.

2. The contract is awarded to Blakeslee Towing and Recover, Inc. d/b/a Courthouse Towing.

3. This Order constitutes a Final Judgment for purposes of appeal.

Valerie H. Armstrong, A.J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

CAPE MAY COUNTY
LAW DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAPE MAY COUNTY
DOCKET NO. CPM-L-804-09

BLAKESLEE TOWING RECOVERY, INC. D/B/A COURTHOUSE TOWING

Plaintiff,

v.

SEA ISLE CITY AND KINDLE, INC. D/B/A C&E TOWING,

Defendants.

OPINION

Decided: March 12, 2010

Charles W. Sandman, III, Esq. for plaintiff

Louis C. Dwyer, Jr., Esq. for defendant Kindle, Inc.
(Corino & Dwyer, Attorneys at Law)

Paul J. Baldini, Esq. for defendant Sea Isle City
(Paul J. Baldini, P.A.)

VALERIE H. ARMSTRONG, A.J.S.C.

I. Procedural History

Before this court is a Complaint in Lieu of Prerogative Writs (Complaint) and Order to Show Cause challenging the award of a competitive bidding contract to defendant Kindle, Inc. d/b/a C&E Towing (Kindle) for towing, storage, and lockout services in Sea Isle City, New Jersey. The Complaint was filed on November 18, 2009 by Plaintiff, Blakeslee Towing Recovery, Inc. d/b/a Courthouse Towing (Blakeslee). Answers were filed by Defendants, City of Sea Isle City (the City) and Kindle. In lieu of proceeding by way of Order to Show Cause, the court held a case management conference and established a briefing schedule. A hearing on the merits of the Complaint was heard on February 09, 2010.

II. Facts

On September 17, 2009, the City advertised for sealed bids for towing, storage and lockout services for vehicles located within the City including vehicles requiring such services as identified by the Sea Isle City Police Department. The "Invitation to Bid" provided in relevant part:

> Bidders shall follow *all* instructions and specifications as set forth in the proposal to bid. *Do not assume anything.* In case of doubt as to the meaning of any part of the specifications, get in touch with our office immediately, *before you submit your bid.* If you cannot meet the specifications, you should not submit a bid. [Emphasis added].

Section 3(a) "Award of the Contract," of the "Specifications" provided:

> The City intends to award a contract to the qualified towing, storage facility and lockout Contractor that fully meets the requirements as outlined in the specifications and that submits the lowest averaged rates and fees for the towing, storage and lockout services as listed on the Proposal Form.

Three entities submitted bids for the towing, storage and lockout contract: (1) Blakeslee[1]; (2) Kindle; and (3) World Class Management Corp. d/b/a World Class Towing ("World Class").[2] The bids were received and opened on October 06, 2009. The following day, the bids were reviewed more fully. Kindle was the lowest bidder although the City's Qualified Purchasing Agent, Carmela Desiderio (Desiderio), recognized deficiencies in Kindle's bid. Because of these deficiencies, Desiderio contacted the City Solicitor to discuss the matter. Pursuant to Paragraph (11) of the "Instructions to Bidders" the City reserved the right to waive any informalities in a bid submission. This paragraph in pertinent part provided:

> The City expressly reserves the right to split bids, to reject any and all items/services covered in the bid request, in accordance with state statutes or any portion(s) thereof, waive any informalities in a bid, including the accompanying documents, re-advertise and/or take such remedial action necessary and in the interest of the City of Sea Isle City. Further the City reserves the right to reject any bid if evidence submitted by or investigated of such bidder fails to satisfy the City that the bidder is properly qualified to carry out the obligations of the bid.

On October 13, 2009, prior to the award of the contract, Desiderio met with William Kindle, President of Kindle Ford and Mercury Lincoln Dodge, Inc., to discuss various aspects of Kindle's bid submission.

In reviewing Kindle's qualifications and as part of her investigation of the apparent deficiencies in Kindle's bid submission, Desiderio did the following according to paragraphs 20-28 of her February 02, 2010 certification:

> 20. On October 7, 2009 I contacted the City Solicitor and discussed deficiencies noted in the apparent low bidder Kindle. Some deficiencies appeared to clearly be diminimus [sic] or waive able [sic] and some seemed to require further thought and discussion.

[1] At the time of the submission of the bids, Blakeslee had held the towing contract for more than a decade.
[2] World Class is not a party to this action and did not challenge the contract award to Kindle. During oral argument on February 09, 2010, Blakeslee indicated that World Class was no longer in business.

21. Discussions continued through October 8, 2009. These discussions were in a nature of personal conferences as well as telephone calls.

22. On October 13, 2009 as a continuing review of the apparent low bidder, I presented myself to Kindle Ford and met with Bill Kindle discussing various aspects of the bid submitted. We discussed the fact that Kindle recently acquired C&E Towing. I was able to verify that Kindle purchased the business C&E Towing, keeping the main or key employee. After reviewing this information with the Solicitor, it was determined that C&E Towing although owned by a different entity had the requisite 3 years experience. The City was interested in the experience of the Towing Company as opposed to the specific owner of the Towing Company.

23. Although the primary place of business did not have a fence, the auxiliary storage yard did have fencing. Mr. Kindle explained that all vehicles would be towed to the fenced storage area just down the road from the primary business and stored at that location. All dealings with the public would be conducted at the auto dealership. No vehicles would be stored at the primary business location but would be brought to the dealership for pickup by the customer seeking the retrieval of their vehicle. No business would be transacted at the storage area. The City was satisfied that the fencing requirement of the bid package was met since no vehicles would be stored in an unfenced area. The City was also satisfied that adequate office, bathroom, waiting room, lightning and signage was available at the point where the public would deal with the Towing Company and since there was no public at the storage area the requirement of the bid specifications had been met.

24. On October 13, 2009, I observed the signage in place at both facilities sufficient as to meet the City of Sea Isle City's requirements.

25. While on site on October 13, 2009, I did have the opportunity to view the heavy equipment that was to be utilized by Kindle and accepted same as meeting the bid specifications. I saw and was advised that there were numerous 4 wheel drive vehicles on site and capable of meeting the City's needs. I also saw and accepted as being able to meet the City's needs heavy duty wreckers and tow vehicles.

> 26. There remained certain issues which were again discussed with the Solicitor on October 13, 2009 and were deemed as waive able [sic] or curable. This included the lack of a Certificate of Occupancy and/or Usage Agreement for the primary and secondary facilities.
>
> 27. In consultation with the Solicitor, the Certificate of Surety signed by the Managing Person of Kindle was accepted as legally binding the Surety Company as well as Kindle even though not signed by the principal but rather signed by the Managing Person for the Corporation.
>
> 28. After obtaining the final legal opinions, I requested that the bids be accepted and awarded at the evening meeting of October 13, 2009. I also requested from the Solicitor a written memorialization of the opinions which had been relied upon.

Paragraph (4) of the bid "Specifications" entitled "Qualifications of Bidders," required submission of information regarding the bidder's experience. This section in pertinent part provided:

> Each bidder shall be required to furnish with their bid, the names of other municipalities and/or businesses for who [sic] they have and/or are currently providing contract towing, storage and lockout services. Additionally, each bidder shall be required to submit a listing of towing, storage and lockout service contracts that have been held by the named bidder, within the past three (3) years that are similar in scope and nature. The City reserves the right to use these references and/or their performance on any municipal/business towing, storage and lockout contracts in making its award determination. Failure to submit this required information with the bid shall submit said bid to immediate disqualification by the City.

As noted in her certification, after investigating and meeting with William Kindle, Desiderio was satisfied that Kindle was qualified in the business of towing, storage and lockout services. Kindle, which had recently acquired C&E Towing, retained a C&E Towing employee who had fifteen years of experience. Further, the City contends that it is of no moment who previously owned the Company; corporations routinely acquire other businesses. Blakeslee counters that the

retention of one managerial employee from C&E Towing fails to demonstrate that Kindle possesses the requisite experience as a qualified bidder. Blakeslee, further, asserts Kindle's operation of a car dealership is not equivalent to the operation of a towing services business.

Next, Desiderio was concerned that Kindle's principal place of business lacked an enclosed area for temporary storage of towed vehicles. Desiderio was also concerned about the lack of public accommodations at the off site storage area for the vehicles. Pursuant to paragraph (5) of the bid "Specifications" entitled "Facilities" [sic] the bidder, among other things, was required to provide:

> a.) The Bidder shall be required to provide the name and address of their Principle [sic] place of business within or outside of the City. At their principal place of business, the bidder shall have an office area, public restroom and telephone. All administrative and customer accommodation areas shall be kept clean, neat, well maintained and presentable at all times to the general public. Response time shall be calculated from the principal place of business. At their principal place of business and/or satellite place of business, the bidder shall have an office area with a public restroom and telephone.

Pursuant to paragraph (8) of the bid "Specifications" entitled "Storage Area," the bidder has to meet the following qualifications:

> a.)The Contractor will provide and maintain a temporary storage area for the use of the City of Sea Isle City for all vehicles towed by the contractor pursuant to this contract. The Contractor shall be required to tow all vehicles to this storage facility. Therefore the term storage facility shall be a facility for temporary storage of towed vehicles and in no way intended to store such vehicles for a long period of time.
>
> (i.) The storage facility shall be within a six (6) foot high secured enclosure, properly maintained and in compliance with all local zoning, licensing and code enforcement laws.
>
> (ii.) The storage facility shall have a sufficient office and waiting room area. These facilities shall be capable of handling

the procedures of properly releasing towed vehicles to their owners

(iii.) The storage facility shall be manned during the business hours of eight (8) am to five (5) pm Monday through Friday and nine (9) am to twelve (12) noon Saturday, and may be closed on Sunday and Holidays. These hours of operation are mandatory from April 1 to September 15 of every year covered by this agreement. Times of operation of storage facility from September 16 to March 31 shall be determined by the Chief of Police and the successful contractor.

(iv.) The storage facility shall be at the Contractors principal place of business and such location shall meet local zoning, licensing and code enforcement laws for such usage.

(v.) The Contractor shall produce reasonable proof of ownership or lease of the storage facility.

(vi.) The storage area shall be lighted from dusk till dawn.

(vii.) The Storage facility shall have a minimum useable storage area for not less than twelve vehicles. Useable storage area shall be the area exclusively used for the storage of towed vehicles for the City of Sea Isle City.

b.) The storage facility shall have the proper sign identification upon the same and shall be kept clean as to be reasonably accommodating to persons who may come upon said premises.'

Kindle's principal place of business is located at 525 Stone Harbor Boulevard, Cape May Court House, New Jersey. At this location all business with persons, whose vehicles have been towed from the City, would be transacted.[3] This location is equipped with an office, restroom, waiting room, adequate lighting and signage. Kindle's storage area, where the vehicles would be towed and stored has an enclosed area, and is located at 9 Shellbay Avenue, Cape May Court House[4], New Jersey, three minutes away from Kindle's principal place of business location. The City, upon investigation after the bids were opened, but prior to the award of the contract, was

[3] Blakeslee asserts that the signage at this location is inadequate. The court does not question the City's determination that the signage is adequate.

[4] Cape May Court House is part of Middle Township.

satisfied that Kindle met the requisite criteria for storage area at the secondary site. There would be no interaction with the public at the storage area which had no office, restroom, or waiting room. In concluding that Kindle met the bid requirements for "Facilities" and "Storage Area," the City relied upon paragraph (22) under "Instructions to Bidders" which provides in pertinent part:

> In all cases *where bidders take exceptions to the specifications* and claim their exceptions to be "EQUAL" to the specifications, the City shall be the final judge as to whether or not the exception is, in fact, equal to the requirements as set forth in the specifications. Any differences that should arise between the contracting parties, as to the meaning or intent of these instructions or specifications, will be reviewed and decided by the City's Purchasing Agent and said decision shall be final and conclusive.[5] [emphasis added.].

Blakeslee argues that Kindle failed to adequately meet the storage area requirement because the "Specifications" required that the storage area be located at the site of the principal place of business and that the storage area be enclosed. While Kindle's storage area is enclosed, it is not located at the principal place of business site. At the time of the bid submission, Kindle's principal place of business did not have an enclosed area to accommodate vehicles towed from the City. Further, Blakeslee alleges that Kindle would need site plan approval from the Middle Township Zoning Board to erect a fence at Kindle's primary business location.

In response, Kindle argues that site plan approval is not required in order to erect an enclosure at its primary facility. Kindle relies on a December 16, 2009 letter from, David L. May (May) Middle Township's Zoning Officer. This letter, which was received more than two months after the award of the contract, in relevant part states:

> It is my opinion that no site plan approval will be required to install a chain link fence in the area of the existing vehicle/storage

[5] The bid "specifications" included at the end of each section the word "Exceptions" with space provided for the bidder to make note as to any "exceptions" it was claiming regarding that particular specification. Notably, Kindle's completed bid package did not claim any "exceptions."

> display area. Prior to any construction, plans must be submitted indicating the location of the proposed chain link fence.

By way of certification dated January 18, 2010, William Kindle stated in paragraph 3:

> Rather than have a protracted debate over whether both of Defendant's properties are required to be fenced, defendant will immediately cause an area at the main dealership to be fenced.

William Kindle certified on February 05, 2010, that fencing was installed at the primary business location subsequent to the award of the contract.

On December 31, 2009, Blakeslee wrote a letter to the Middle Township Zoning Board seeking clarification of May's December 16, 2009 letter to Kindle. On February 02, 2010, May wrote to Kindle's attorney. This letter in pertinent part provides:

> In further reviewing the above mentioned project, I have spoken with the Township Solicitor, James Pickering, as well as Planning Board Attorney, John Ludlam on whether a towing business goes along with the auto sales and repair business currently located at 525 [sic] Stone Harbor Blvd, which has approvals. Mr. Pickering, Mr. Ludlam, and I feel Mr. Kindle should obtain a use variance for the towing business and second use on the property since it doesn't go with the approvals currently in place.

Based on this letter, Blakeslee alleges that Kindle is not a qualified bidder and the City improperly awarded the contract. Kindle responded on February 05, 2010 to May's February 02, 2010 letter alleging that it is unnecessary for Kindle to obtain a use variance because a towing service is an accessory use to the auto dealership. As of the date of the instant hearing, no response to Kindle's February 05, 2010 letter has been received.

While the contract was awarded to Kindle on the evening of October 13, 2009, Desiderio on that same date requested that supplemental information be provided by Kindle, based upon the City Solicitor's opinion that certain items were non-material, waivable and curable specifically "missing licenses or expired registrations, missing certificate of Occupancy and/or

Usage Agreements, etc." See Desiderio February 02, 2010 Certification. Desiderio certifies that this supplemental information was received on October 16, 2009. On December 08, 2009 the City received from Kindle an Amended Insurance Certificate revising the notice time to the City from 30 days to 60 days as required by paragraph (17) "Insurance Requirements" of the bid "Specifications."

The "Facilities" subsection for the bid "Specifications," requires bidders to provide:

> A copy of the certificate of occupancy and/or usage agreement for each site at which bidder shall maintain an office and/or storage facility shall be submitted with the Bid documents for review by the City. If no certificate of occupancy and/or usage agreement is required, then the bidder shall be required to submit a certification and/or letter from the local zoning office stating that no certificate of use is required for their business.

Further, the bid "Specifications" paragraph (8) entitled "Storage Area" in relevant part provides:

> e.) The Contractor shall be responsible to provide a certification or letter from the local zoning officer stating that storage of towed, damaged, wrecked, or otherwise inoperable motor vehicles at this location is permitted under the local zoning ordinance.
>
> f.) The Contractor shall be responsible to provide proof of ownership or rental of the storage facility of [sic] facilities. In the case of rental, a copy of the fully executed lease agreement covering the term of this contract shall be submitted. Said lease shall state that the storage of towed vehicles will be allowed under the lease provisions.

Kindle asserts that it provided a Certificate of Occupancy[6] for its principal place of business and it provided, post-bid, the lease agreement for the storage area which constitutes an Occupancy Agreement. On the other hand, Blakeslee contends that the storage area required a certified letter from the zoning office stating that no certificate of use is required. rather than a lease agreement to be compliant with this specification.

[6] As noted above, per Desiderio's certification, this document was provided on October 16, 2009.

Additionally, pursuant to the "City of Sea Isle City Checklist" a Certificate of Surety was required with the bid submission. Subsection (f) of paragraph (3) "Award of the Contract" of the bid "Specifications" in relevant part provides:

> Bidders shall be required to furnish with their bid a Certificate of Surety from a bonding company and/or corporate surety that is authorized to do business in the State of New Jersey...

Blakeslee contends Kindle's submission of a Certificate of Surety signed by a manager, rather than the principal of the corporation is a material, non-waivable defect. Therefore, Kindle's bid should have been rejected. Kindle, conversely, asserts that the managerial employee was acting as an agent of the Corporation by signing the Certificate of Surety. Subsequent to the opening of the bids, Kindle submitted a supplemental Certificate of Surety signed by Kindle's President.

As to the equipment requirement of the bid "Specifications," Blakeslee laments that Kindle's failure to include a four-wheel drive vehicle with its bid submission is a material, non-waivable defect rendering Kindle an unqualified bidder. Pursuant to the bid "Specifications" paragraph (7) entitled "Classification of the Wreckers," the following was required:

> a.)The Contractor shall provide with their proposal a detailed listing of the equipment be [sic] utilized during the duration of the contract.
>
> ....
>
> b.) The Contractor shall be required to have immediate accessibility to a minimum of three (3) light duty vehicles; two (2) car carrier vehicles and one (1) additional vehicle shall have four-wheel drive capabilities.

On the other hand, Kindle contends it possesses more than 50 four-wheel drive vehicles, but acknowledges it failed to specifically identify and designate a four-wheel drive vehicle in its bid submission because each of its four-wheel drive vehicles are interchangeable. However, Kindle, post-bid, has designated a specific four-wheel drive vehicle to be used in the towing business.

On September 22, 2009, Desiderio issued "Addendum A" to the bid "Specifications" for subsection "Classification of Wreckers" paragraph (b), which was mailed via certified mail to each bidder. Addendum A provided:

> Page Numbered 6 Section 7 Classification of the Wreckers
> Paragraph b should read:
>
> The Contractor shall be required to have immediate accessibility to a minimum of three (3) vehicles each defined on page 7 under Classifications of the Wreckers Paragraph C. Definitions of Wreckers (i) Light Duty Wrecker, (ii) Car Carrier (flat bed) and (iii) heavy duty wrecker.

Desiderio, in her supplemental certification submitted to the court provides:

> The addendum removed any requirement for a 4-wheel drive wrecker as part of the bid requirements. [sic].

However, Blakeslee, who raised the question concerning the intent of the bid "Specifications", contended at the instant hearing, through testimony provided by, Louis H. Altobelli, Jr., Blakeslee's owner that Addendum A did not alter the bid specifications by removing the 4-wheel drive vehicle from the bid requirements. Rather Addendum A merely added a heavy duty wrecker definition to the bid specifications which definition has been previously omitted. Altobelli's testimony described the rationale for the City's Towing Company to possess a four-wheel drive wrecker. Specifically, the four-wheel drive wrecker is capable of pulling other four-wheel drive vehicles off the beach when they become caught in the sand. Subsequently, Kindle through the testimony of Edward Boyle, an employee of Kindle who prepared Kindle's bid submission, testified that it was his understanding that Addendum A did not make any reference to a heavy duty four-wheel drive wrecker. Nevertheless, Boyle testified that post-bid, Kindle acquired a four-wheel drive wrecker. Interestingly, while claiming that the four-wheel drive vehicle requirement was eliminated by the Addendum, Desiderio's February 02, 2010

Certification at paragraph 25, makes a point of noting that during her on-site investigation of Kindle's qualifications post-bid, but pre-award of the contract, she observed four-wheel drive vehicles at Kindle's place of business.

Lastly, Blakeslee takes issue with Kindle's Insurance Certificate which had a 30 day rather than a 60 day cancellation policy as required by the bid specifications. Under the bid "Specifications" paragraph (17) (b) (ix), "Excess Umbrella Insurance," the following was required:

> The successful bidder shall provide the City with certificates of insurance evidencing the coverage required above and naming the City as insured. Such certificates shall provide that the City be given at least sixty (60) days prior written notice of any cancellation of, intention to not to renew, or material change in such coverage. These certificates must be provided before commencing work in connection with the contract. Failure to submit this with the bid shall subject said bid to immediate disqualification.

Kindle, post bid, obtained an amended insurance certificate with a 60 day cancellation policy. The City and Kindle assert this deficiency was de minimis.

Based on the above deficiencies, Blakeslee argues it was the only qualified bidder and thus should have been awarded the contract. Further, Blakeslee contends even if these deficiencies individually are deemed non-material and waivable, on the whole, Kindle's bid was so overwhelmingly deficient that the City should have rejected it. The City and Kindle counter that any deficiencies were non-material and waivable and the City reserved the right to waive any curable defects.

Additionally, the City argues in the alternative that if Kindle is declared to be an unqualified bidder, the contract should be awarded to World Class, the next apparent low bidder. The City and Kindle allege that Blakeslee tried to manipulate the bidding process by bidding

only $1.00 for lockout services and $1.00 for municipal tow rates which take advantage of the overall bidding averages. By comparison, Kindle bid $45.00 for lockout services and $35.00 for municipal tow rates and World Class bid $45.00 for lockout services and $0.00 for municipal tow rates.

After the contract was awarded to Kindle, Blakeslee wrote a letter dated October 19, 2009, contesting the bid award to Kindle due to numerous material and non-waivable deficiencies; therefore the contract award was improper and Kindle's bid should have been rejected. On October 27, 2009, Blakeslee sent an another letter to the City contesting the contract award to Kindle and providing an unpublished Appellate Division decision which it believed was relevant. On November 16, 2009, the City responded that it affirmed its contract award to Kindle.

During oral argument, the issues argued were as follows: (1) facility and storage area; (2) insurance policy; (3) certificate of occupancy and/or usage agreement; (4) level of required experience; (5) equipment; and (6) unbalanced bid.

II. Discussion

Bidding for public contracts is governed by the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-1 et seq. The LPCL is designed to advance the public good by securing the most economical public contracts, thereby affording savings to the taxpayers. The purpose is not to protect the interests of the individual bidders, though, in general, they likely also benefit from the standards set by the LPCL. Rather the LPCL aims "to secure competition and to guard against favoritism, improvidence, extravagance and corruption." Twp. of Hillside v. Shephard Sternin, 25 N.J. 317, 322 (1957). The LPCL seeks "to secure for the public the benefits of unfettered competition." Terminal Construction Co. v. Atlantic County Sewerage Authority, 67

N.J. 403, 410 (1975). Accordingly, "bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited." Terminal Construction Co., 67 N.J. at 410. If corrupt practices or the appearance of any such corrupt practices played a role in the ultimate contract award, the bid will be set aside even if "it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process." Id. at 410. Therefore, bids for public contracts that exceed the statutory threshold amount must be advertised and contracts must be awarded to "the lowest responsible bidder." N.J.S.A. 40A:11-4.

In order to secure competition, the specifications and conditions applying to the receipt of bids must be available and apply equally to all prospective bidders. If each bidder is not held to the same standards, there is no basis on which to fairly evaluate their bids. "Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders." Sternin, 25 N.J. at 322. Accordingly, the courts have interpreted the term "lowest responsible bidder"—to which the LPCL mandates the award of some public contracts—to refer to "the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications." Meadowbrook Carting Co., Inc. v. Boro. of Island Heights and Consol. Waste, 138 N.J. 307, 313 (1994). Stated alternatively, the "lowest responsible bid" is not limited to just the amount of the bid, but also means that the bid conforms to the specifications. Sternin, 25 N.J. at 324.

The New Jersey Supreme Court has declared that "strict compliance" with bidding specifications is required, and that the local government is generally without discretion to accept defective bids. Meadowbrook Carting Co., Inc. v. Boro. of Island Heights and Consol. Waste,

138 N.J. at 314. "It is well-settled that a material defect in a bid may not be waived or cured after the violation has occurred." L. Pucillo & Sons, Inc. and Chetcar Realty v. Twp. of Belleville et al., 249 N.J. Super. 536, 545 (App. Div. 1991). Consequently, a nonconforming bid that deviates from material portions of the bid specifications renders any contract awarded under it invalid. To find otherwise, would erode the policy of the LPCL by disregarding the advantages of competition, the necessity for bidders to be placed on equal footing, and ultimately the benefits to taxpayers.

By the same token, minor, immaterial irregularities may be waived by a public body. Sternin 25 N.J. at 324. Indeed, in some cases where the irregularity is insubstantial, a governing body may have a duty to waive it. See Twp. of River Vale v. R.J. Longo Constr. Co., Inc. and Campoli and Son, Inc., 127 N.J. Super. 207, 222 (Law Div. 1974). Still, those situations are limited to where the requirement does not "go to the heart of the bidding process," and where there is neither possibility of corruption or favoritism, nor any public perception thereof. Statewide Hi-Way Safety, Inc. v. N.J. Dept. of Transp., et al., 283 N.J. Super. 223, 232 (App. Div. 1995). Further, non-material, waivable conditions may not be those which are "likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding." Star of the Sea Concrete Corp. v. Lucas Brothers, Inc., 370 N.J. Super. 60, 69 (App. Div. 2004)(internal quotations omitted). Therefore, even if a municipality, such as in the instant case, expressly reserves the right to waive certain defects in the bid submission; a municipality cannot waive "substantial noncompliance" with the bid specifications. Sternin, 25 N.J. at 324.

Nevertheless, rejection of a bid by a public body may be based solely on non-material defects "as long as the decision to reject is non-pretextual and reflects sound business judgment."

Michael A. Pane, Jr., New Jersey Practice: Local Governments Law, §15.22 at 149 (4th ed. 2007) citing Serenity Contracting Group, Inc. v. Borough of Fort Lee, 306 N.J. Super. 151 (App. Div. 1997) (internal quotations omitted). It is settled doctrine, pursuant to bid advertisement under the LPCL that the "low bidder should be offered a hearing as to any issue regarding compliance of the low bid with the specifications where a disinterested observer could find room for reasonable debate." Id. at 150. A low bidder may be rejected without a hearing "[o]nly when it is overwhelmingly clear that the low bidder does not meet the specifications" in the bid package. Id. citing William A. Carey & Co. v. Borough of Fair Lawn, Bergen County, 37 N.J. Super. 159, (App. Div 1955). The fundamental policy of the LPCL, i.e. to encourage competition, prevent fraud and/or favoritism, and promote the best interest of the municipality, underlies the hearing requirement. Id. citing Serenity Contracting Group, Inc. v. Borough of Fort Lee, 306 N.J. Super. 151 (App. Div. 1997). Regardless, if the public body rejects one bidder, the bid should not be re-bid, but rather another conforming bidder should be selected to perform the contract. Id. citing Bodies by Lembo, Inc. v. County of Middlesex, 286 N.J. Super. 298 (App. Div. 1996).

In this case, at the February 09, 2010 hearing, Blakeslee asserted Kindle failed to comply with several portions of the bid specifications including: (1) facility and storage area; (2) insurance policy; (3) certificate of occupancy and/or usage agreement; (4) level of required experience; and (5) equipment. Blakeslee argues these failures constitute material, non-waivable defects to the bid, and as such Kindle's bid should have been rejected. Blakeslee contends it is the only qualified bidder and should be awarded the bid contract. Conversely, Kindle and the City allege that any of the deficiencies in Kindle's bid submission were immaterial and waivable, thus Kindle was properly awarded the bid contract. In the alternative, the City asserts in the

event this court finds that Kindle's bid submission failed to comply with material, non-waivable provisions, the contract should be awarded to the next lowest bidder, World Class, rather than Blakeslee because Blakeslee submitted an unbalanced bid due to bidding $1.00 for lockouts, and towing of municipal vehicles.

The court will address each of these asserted deficiencies below.

A. Facility and Storage Area

Blakeslee asserts that Kindle failed to comply with the "Facilities" and "Storage Area" specifications because Kindle's principal place of business did not have a secured enclosure for the storage of towed vehicles and its off-site storage facility, which does have a secured enclosure, does not have an office, public restroom, waiting room, telephone, adequate lighting and signage, and transactions with the public will not occur at that location. Blakeslee further contends that Kindle was required to comply with all requirements for "Facilities" and "Storage Area" at both its principal location and off-site storage area. In other words, the storage area must be located at the principal place of business. Hence, failure to comply renders Kindle's bid materially defective.

Kindle and the City assert that Kindle has complied either directly, or equivalently with both the "Facilities" and "Storage Area" requirements. Desiderio, cognizant of multiple deficiencies in Kindle's bid submission met personally with William Kindle. She inspected the Kindle premises in order to determine if the bid specifications were met. There is no indication that similar inspections were made of Blakeslee's or World Class' premises. After Desiderio met with Kindle, she and ultimately the City, were satisfied that the Shellbay Avenue storage area had a secured enclosure for the towed vehicles, while Kindle's principal place of business had the required office, public restroom, waiting room, telephone, adequate lighting and signage;

further, the on-site visit by Desiderio confirmed that transactions with the public would occur only at the principal place of business where the public amenities were located, as the towed vehicles would be brought to the customers from the off-site storage area to the principal place of business. Additionally, Kindle certified, after being awarded the contract, that a fence would be installed at the principal place of business and that no zoning approvals for the fence are necessary. However, Blakeslee asserts that zoning approvals are required before Kindle can lawfully erect the enclosure. For the reasons discussed below, it is unnecessary for the court to resolve whether zoning approval for the fence at Kindle's principal business location is required.

The contract was for towing, storage, and lockout services. Essential to towing operations is a secure, enclosed, temporary storage area for vehicles that are removed from the roadway by the contractor. The facilities and storage area specifications including satisfying zoning requirements are central components for this contract. Failure to comply with these specifications goes to the very heart of this contract. The "Facilities" and "Storage Area" specifications are patently clear that customer convenience and comfort, and vehicle security are material, non-waivable requirements. Equally material and non-waivable is compliance with zoning requirements relevant to the business of towing and storage of towed vehicles. Lack of compliance with applicable zoning regulations leaves open the possibility of inability to perform the contract. Kindle failed to meet the "Facilities" and "Storage Area" specifications at the time of its bid submission.

The bid "Specifications" for "Facilities" and "Storage Area" at issue in the instant litigation are summarized below with specific reference to the applicable bid Specifications:

1. The bidder must have a principal place of business with an office area, public restroom, and telephone. See "Facilities," (5) (a).

2. There shall be submitted with the bid documents, a copy of the certificate of occupancy or usage agreement for each site where a bidder maintains its office and storage facility. If no certificate of occupancy or usage agreement is required, the bidder must submit a certification or letter from the local zoning office that no certificate of use is required for the business. See "Facilities," (5) (a).

3. A temporary storage area for use of all vehicles towed by contractor from the City limits shall be provided. See "Storage Area," (8) (a).

4. The storage area shall be within a 6 foot high secured enclosure in compliance with all zoning laws. See "Storage Area," (8) (a) (i).

5. The storage area shall have a sufficient office and waiting area capable of handling procedures for release of towed vehicles to their owners. See "Storage Area," (8) (a) (ii).

6. The storage area shall be at the contractor's principal place of business which location must meet local zoning laws for such usage. See "Storage Area," (8) (a) (iv). It is also clear from the "Specifications" for "Facilities" and "Storage Area" that if a bidder maintains a satellite location, the storage area as well as the office area, public restroom and telephone must all be located at the satellite location. In other words, the entire towing operation must operate on one site, whether the principal location, or the satellite location.

7. The contractor shall produce reasonable proof of ownership or lease of storage facility. See "Storage Area," (8) (a) (v).

8. The contractor shall provide a certification or letter from local zoning officer stating that "storage of towed, damaged, wrecked, or otherwise inoperable motor vehicles at this location is permitted under the local zoning ordinance." See "Storage Area," (8) (e).

9. The contractor must provide proof of ownership or rental of the storage area. If rented, a copy of lease must be provided stating that storage of towed vehicles will be permitted under lease provisions. See "Storage Area," (8) (f).

A review of the above requirements reveals the following compliance, or lack thereof with each of the enumerated paragraphs:

1. This requirement was satisfied.
2. It is undisputed that no Certificate of Occupancy (C of O) was submitted for the principal place of business until after the bid was accepted. However, the submission post-bid cured that defect. The C of O was issued to Kindle by Middle Township in 1990. This was not a matter of Kindle obtaining the C of O after the fact, i.e. waiting to see if the contract was awarded before applying for the C of O. Rather it was a matter of Kindle submitting the document already in its possession several days after the contract was awarded. However, no C of O, or usage agreement, or alternatively, certification or letter from the local zoning office that a certificate of use was not required, was submitted for the off-site storage area. This is a material defect.
3. Kindle did provide a temporary storage area for the towed Sea Isle City vehicles. However, it was not located at Kindle's principal place of business. This is a material defect.

4. The off-site storage area was enclosed. However, nothing was provided with Kindle's bid documents to evidence that the storage site was in compliance with all zoning laws. This is a material defect.
5. The storage facility did not have an office and waiting area capable of handling procedures for release of towed vehicles. This is a material defect.
6. The storage area was not located at Kindle's principal place of business. Nothing was provided by Kindle from the Middle Township zoning office indicating that the principal business location was zoned for this type of towing business. The submission of a mercantile license for Kindle, Inc. d/b/a C&E Towing dated October 19, 2009 applied for and issued and six days after the contract awarded does not provide the necessary proof that Kindle's principal place of business was in compliance with Middle Township's zoning laws for a towing business. These are material defects.
7. While a lease for the storage area was provided, it was submitted post-bid. This is a material defect.
8. No certification or letter was provided by the zoning office that storage of towed, damaged or wrecked, or otherwise inoperable motor vehicles was permitted under the applicable zoning ordinance. This is a material defect.
9. A copy of the lease for the storage area was provided subsequent to the submission of Kindle's bid. The lease does not state that storage of towed vehicles is permitted under the lease provisions leaving open the question of whether such storage is permitted under the lease. This is a material defect.

The Supreme Court has adopted a two-prong test to determine "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207, 215 (Law Div. 1974). In Meadowbrook Carting Co., Inc., v. Borough of Island Heights and Consolidated Waste Services, Inc., 138 N.J. 307, 315(1994), the Appellate Division observed that the River Vale, test requires:

> [f]irst whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to the required specifications, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. Meadowbrook, supra.

The safety, condition and amenities of the facility where the public's motor vehicles are towed (in many cases involuntarily and without their prior knowledge) and ultimately released back to the owner, is a critical and material component of any municipal bid package for towing services. The City argues that Kindle "equivalently" met the bid specifications for "Facilities" and "Storage Area." The City's and Desiderio's determination that Kindle could provide a separate storage area off-site from the principal place of business was tantamount to rewriting the bid specifications for a material, critical requirement, thereby frustrating the very policies underlying the competitive bidding statutes. It makes no difference that the waiver and/or "equivalency" determination may have been in good faith. At the risk of some redundancy, the court stresses:

> If erosion of the [LPCL] policy is to be avoided, even in such a state of affairs, the municipality cannot be permitted to breathe validity into an invalid bid by waiver. In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposefully left that way. Only by this approach can the desirable protection be afforded to the taxpayers; only in this

way can perfect equality be maintained among bidders. Twp. of Hillside v. Stevens, 25 N.J. 317, 326 (1957).

Kindle was placed in a more advantageous position than other bidders, paving the way for erosion of the policies that the competitive bidding statutes seeks to protect, and became "[a] vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the mount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons." Terminal Construction Corp., 67 N.J. at 412. In this case, potential bidders may have refrained from bidding because the bid specifications did not state that the City might after opening the bids deem it acceptable to have a secured enclosure for towed vehicles at one location, while providing the required office, waiting room, public restroom, adequate lighting and signage at another location. It is also noteworthy that while the City, in essence, rewrote its own bid "Specifications," by deeming acceptable Kindle's separate locations for interacting with the public whose vehicles were towed and storage of the towed vehicles, pursuant to the analyses set forth above, the City also waived certain material "Specifications" for each of the sites. Further, Desiderio's post-bid, meeting with Kindle, when she inspected Kindle's facilities and equipment, and discussing Kindle's bid proposal without doing so for the other two bidders, at the very least, creates the appearance and/or opportunity for favoritism. This appearance of favoritism, whether perception or reality, combined with the City's disavowal of its own bid Specifications, is sufficient enough to render the award of the bid invalid. Therefore, Kindle's failure to comply with the "Facilities" and "Storage Area" specifications is a material, non-waivable defect and Kindle's bid should have been rejected.

B. Insurance Policy

Next, Blakeslee contends that Kindle's failure to provide with its bid proposal an Insurance certificate with a 60 day written notice of cancellation policy leads to an automatic rejection of Kindle's bid. Kindle, in contrast, contends that it provided with its bid documents an Insurance Certificate with a 30 day written notice of cancellation and subsequent to the bid award amended its policy to 60 days. Kindle and the City argue that this failure to provide with the bid documents an Insurance Certificate with a 60 day notice provision is *de minimis* and waivable. The relevant portion of the specifications pertaining to the Insurance requirements, in pertinent part, provides:

> The successful bidder shall provide the City with certificates of insurance evidencing the coverage required above and naming the City as insured. Such certificates shall provide that the City be given at least sixty (60) days prior written notice of any cancellation of, intention to not to renew, or material change in such coverage. *These certificates must be provided before commencing work in connection with the contract. Failure to submit this with the bid shall subject said bid to immediate disqualifications* [sic]. [emphasis added.].

The last two sentences of the above Specification are indisputably contradictory. On one hand, the specifications specify the 60 day Insurance policy "must be provided *before commencing work* in connection with the contract." [emphasis added]. On the other hand, the bid specifications state, "[f]ailure to submit this with the bid shall subject said bid to immediate disqualifications." However, the bidder's Checklist provides that the Certificate of Insurance is *recommended* to be submitted with the bid, but "if awarded, [the Certificate] must be provided with your signed contract." [emphasis added]. Here, Kindle provided a 30 day cancellation policy with its bid proposal. However, prior to the commencement of work under the contract and after its bid submission, Kindle provided an amended 60 day cancellation policy. In the face of the contradictory language above when considered in conjunction with the instruction in the

Checklist, because Kindle provided the required 60 day written notice of cancellation Insurance Certificate before work on the contract commenced[7], the court concludes Kindle technically complied with said specifications.

C. Required Level of Experience

Blakeslee argues that Kindle does not possess the necessary three years of experience for Kindle to be deemed a qualified bidder for a towing, storage, and lockout services contract, because Kindle only recently acquired C&E Towing and the retention of a long-term C&E employee is insufficient to satisfy this condition. In contrast, the City and Kindle assert that retention of a key C&E employee satisfies this requirement. Also, the City argues that relevant experience does not hinge on the actual owner of a particular corporation because corporations may routinely change ownership. Pursuant to the bid "Specifications" under subsection "Qualifications of Bidders," the relevant portion in dispute provides:

> Each bidder shall be required to furnish with their bid, the names of other municipalities and/or businesses for who they have and/or are currently providing contract towing, storage and lockout services. Additionally, each bidder shall be required to submit a listing of towing, storage and lockout service contracts that have been held by the named bidder, within the past three (3) years that are similar in scope and nature. The City reserves the right to use these references and/or their performance on any municipal/business towing, storage and lockout contracts in making its award determination. Failure to submit this required information with the bid shall submit said bid to immediate disqualification by the City.

Kindle's bid submission, under the heading "General Contract Information," indicates it has been in the business of towing for 16 years. Kindle provided a list of three references: (1) Kindle Ford Linc Merc; (2) Rodney's Auto Repair; and (3) NJ State Police. Kindle also testified at the

[7] There is no indication in the record that Kindle commenced services under the contract prior to the 60 day notice of cancellation being provided.

hearing before this court that it performed towing services for Middle and Lower Township, Stone Harbor, and All State Motor Club. It is unclear to the court from Kindle's list of references if these were contracts for towing, storage, and lockout services performed in the last three years.

The court reiterates that the bid specifications are in many respects less than clear. While Kindle did respond to the questions regarding experience and references, there is little question, its response was not as extensive as Blakeslee's bid proposal. By the same token, the experiential Specification does not preclude bidders who are new to the towing, storage, and lockout services from bidding. It merely serves as a barometer for the level of experience that the City is considering. The specification did not require a specific level of experience as a prerequisite to being the successful bidder. The specification permitted the City the opportunity to consider the level and quality of experience of a particular applicant. The specification would appear to provide the City with considerable discretion when considering this particular specification. That being the case, it is not for the court to substitute its judgment for the City's determination that the level of Kindle's experience satisfied the City's need.

D. Equipment

The equipment required by the bid "Specifications" was indentified in Paragraph (7) (b) "Classification of the Wreckers." Pursuant to this section, the equipment required is as follows:

> The Contractor shall be required to have immediate accessibility to a minimum of three (3) light duty vehicles; two (2) car carrier vehicles and one (1) additional vehicle shall have four-wheel drive capabilities.

Paragraph (7) (c) "Definitions of Wreckers" provided detailed descriptions for the three types of wreckers: light duty wrecker, (7) (c) (i); car carrier (flat bed), (7) (c) (ii); and heavy duty wrecker (7) (c) (iii). Notably, paragraph (7) (b), did not identify a heavy duty wrecker as being required

equipment. Prior to the due date for the submission of the bids, Desiderio issued Addendum A which was published and sent by certified mail to each of the parties on the bid list. Addendum A reads:

> Page numbered 6 Section 7 Classification of the Wreckers
> Paragraph b should read
>
> The Contractor shall be required to have immediate accessibility to a minimum of three (3) vehicles each defined on page 7 under Classifications of the Wreckers Paragraph C. Definitions of Wreckers (i) Light Duty Wrecker, (ii) Car Carrier (flat bed) and (iii) heavy duty wrecker.

Addendum A replaced the original Paragraph b under "Classification of the Wreckers." Hence, the vehicles required pursuant to Addendum A in order to satisfy the bid specifications were: (1) Light Duty Wrecker; (2) Car Carrier (flat bed); and (3) Heavy Duty Wrecker. Addendum A added a heavy duty wrecker to the list of equipment. As opposed to the original paragraph (7) (b), there was no reference in Addendum A to a four-wheel drive vehicle. Kindle's bid proposal did not identify a four-wheel drive vehicle.

At the hearing before the court, Blakeslee contended during Altobelli's testimony that Addendum A only added a heavy duty wrecker to Paragraph b, but did not eliminate the four-wheel drive vehicle requirement. Kindle through its Service and Parts Director, Edward Boyle, testified that post-bid, it had purchased a four-wheel drive wrecker. Desiderio's initial certification stated that during her investigation of Kindle's qualifications she observed Kindle's equipment making a point of noting that she saw numerous four-wheel drive vehicles at Kindle's site. On the other hand, Desiderio in her supplemental certification later stated that Addendum A removed the four-wheel drive vehicle requirement. By the same token, the City in its brief at page 5 addresses Desiderio's visit to Kindle and her observations regarding Kindle's equipment:

> A great deal is made that there is no four-wheel drive vehicle listed in the equipment as required by the bid specifications. However, as seen by the Certification of qualified Purchasing Agent upon inspection of the facility prior to acceptance of the bid, the heavy equipment was reviewed by the City. *The City ascertained that the appropriate equipment was on site. Specifically, four-wheel drive vehicles were shown to the City and were on location and available for the City to review.* [emphasis added].

The court is somewhat skeptical as to whether the City upon the issuance of Addendum A really intended to eliminate the four-wheel drive vehicle requirement. This skepticism emanates from Desiderio's apparent need to emphasize in her certification that she observed four-wheel drive vehicles during her visit to Kindle' site, as well as the City's brief also emphasizing that Kindle had the "appropriate equipment on-site," specifically "four-wheel drive vehicles." It is also significant that Kindle purchased a four-wheel drive wrecker after being awarded the contract.

However, the literal language of Addendum A makes no reference to a four-wheel drive vehicle. Hence, Kindle's failure to include such vehicle in its bid proposal did not constitute a defect.

E. Unbalanced Bid

The City submits that Blakeslee's bid is unbalanced because it bid $125.00 for Basic Towing Service Rates but only bid $1.00 for lockout services and $ 1.00 for municipal tow rates, thus manipulating the bidding process and creating a competitive advantage for Blakeslee. In comparison, the City contends Kindle's bid represents a balanced bid because it bid $75.00 for Basic Towing Service Rates, $45.00 for lockout services, and $35.00 for Municipal tow rates. Blakeslee testified that its lockout services and municipal tow rates were only $1.00 because this service represents a minor portion of the work under the contract. Notably, Desiderio certified that there were only 48 lockouts compared to 431 tows "up to October 2009."

The City cites Aramiaco v. Cresskill, 62 N.J. Super. 476 (App. Div. 1960) and Boenning v. Brick Twp. Municipal Utilities Authority, 150 N.J. Super. 32 (App. Div. 1977) to support its contention that Blakeslee's bid was unbalanced. The City's reliance on these cases is misplaced. Both matters involved municipal sewage construction contracts in which the municipality during the bidding process established either a minimum or a predetermined price for certain items, with the bidders setting unit prices on other discretionary items. Both matters addressed the issue of unbalanced bidding.

An unbalanced bid "comprehends a bid based on nominal prices for some work and enhanced prices for other work." Aramiaco, 62 N.J. Super, at 483. This means "one or more of the items bid does not carry its share of the cost of the work and the contractor's profit." Id. at 482. A potential bidder may submit an unbalanced bid by increasing the bid price of items of work to be completed first and decrease the bid price of items that would needed to be performed later in the course of the contract. See Boenning v. Brick Twp. Municipal Utilities Authority, 150 N.J. Super. 32, 37 (App. Div. 1977). In the instant matter, the contract for towing, storage, and lockout service does not contemplate that a particular type of service will be performed at an earlier or later time, but rather the contract contemplates performance of any of the three contract services at any given time as the need arises.

Even if the court were to conclude that an unbalanced bid were present in this matter, this "does not automatically operate to invalidate an award of the contract to such bidder." Aramiaco, 62 N.J. Super. at 483. For a bid to be rejected on the grounds that its unbalanced, "[t]here must be proof of collusion or of fraudulent conduct on the part of such bidder and the city or its engineer or other agent, or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding." Id. Here, there is no evidence of fraud and/or collusion nor

is there any semblance of proof offered in the record. Neither the City nor Kindle has directed the court's attention to any realistic possibility of fraud or collusion that Blakeslee may have engaged in when preparing its bid submission or that will occur when performing services under the contract. The fees to be paid under the contract are paid by the vehicle owner whose vehicle has been towed or subject to a lockout. Altobelli testified that there are few lockouts and that they often involved a situation where children have locked themselves in the vehicle. A charge of $1.00 for the service is not a disadvantage to the public. Further, Blakeslee's bid submission is without any substantial irregularity that could reasonably be construed to negatively affect the competitive bidding process.

III. Conclusion

For all of the foregoing reasons, the court finds the following:

1. Kindle's failure to comply with the "Facilities" and "Storage Area" requirements is material, non-waivable defect in its bid submission rendering its bid submission invalid.
2. Kindle complied with the Insurance policy specifications because it amended its policy and provided proof of same before work on the contract commenced.
3. In the City's discretion, Kindle met the necessary experience required for performance under the contract. There is no basis for the court to overturn the City's exercise of discretion in that regard.
4. Kindle met the equipment specifications because Addendum A eliminated the requirement for a four-wheel drove vehicle.
5. Blakeslee's bid was not unbalanced.

The award of the contract to Kindle is invalidated and set aside. The contract is awarded to Blakeslee.

A Final Judgment is enclosed.

Valerie H. Armstrong, A.J.S.C.